BOARD OF CURATORS, LINCOLN UNIVERSITY:
RE: LENA MARTIN, CLAIMANT:

A devise for life with remainder to the heirs of the body is a contingent remainder, and a daughter of a remainderman who predeceased life tenant takes a share in the real estate.

August 10, 1946

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Mr. Sherman D. Scruggs
Acting Secretary
Board of Curators
Lincoln University
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an opinion, based upon the facts stated in a letter to your Board from Merrill and Enger, Attorneys at Law, Keytesville, Missouri. Their letter is as follows:

> "We are writing to you because you are President of the Board of Curators of the Lincoln University, and we are representing Lena Martin, St. Louis, Missouri, in the matter of her claim to an undivided one-seventh interest in the land in Chariton County, Missouri, upon which Dalton Vocational School of the County of Chariton, State of Missouri, is located, and described as follows:
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> (description omitted)
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> "This land is claimed by the Lincoln University. The interest of our client, Lena Martin, is based on the following facts and records:
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> "This land was formerly owned by Louis Frotjan, great grandfather of Lena Martin. By the terms of his will, he left this land to his son, Albert Frotjan, during his lifetime and after his death to his bodily heirs. Albert Frotjan died a few months ago, and Lena Martin, his granddaughter, was his bodily heir by virtue of

> the death of her father, Alonzo Grotjan, several years prior to the death of Albert Grotjan. Lena Martin was the only child of Alonzo Grotjan.
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> "While there was a sale of this land by the guardian and curator of the children of Albert Grotjan, including Lena Martin's father, several years ago, assuming that this deed was a valid conveyance of the remainder in this land, the fact that Alonzo Grotjan preceded the said Albert Grotjan in death, made Lena Martin, the only child of Alonzo Grotjan, the bodily heir of Albert Grotjan, within meaning of the law and the decisions of the State of Missouri, and she is claiming the undivided one-seventh interest in this land as bodily heir.
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> "We are writing to you because we do not know what law firm is representing the Board of Curators or Lincoln University, and feel sure you will refer this letter to your attorneys for we believe that this claim could be settled without the necessity of our going into Court with a suit in partition."

The question presented here deals with remainders. The life tenant and the potential remaindermen attempted to pass title to the grantee, Mary James, who later deeded the land to your institution. The quitclaim deed by the life tenant and the guardian and curator deed for the potential remaindermen were executed prior to the death of the life tenant. Before the death of the life tenant, one of the remaindermen had died, leaving a daughter who now claims an interest because she is an heir of the body of the life tenant.

Section 3500, Mo. R.S.A., provides that the persons determined to be bodily heirs of a life tenant at the termination of the life estate take a fee simple title, when the property is devised or deeded under conditions such as is presented by your request. Said section is as follows:

> "Where a remainder shall be limited to the heirs, or heirs of the body, of a person to whom a life estate in the same premises shall be given, the persons who, on the termination of the life estate, shall be the heir or heirs of the body of such tenant for life shall be entitled to take as purchasers in fee simple, by virtue of the remainder so limited in them."

This section has been construed to mean that a devise of a life estate to one with remainder to the heirs of his body creates a contingent remainder and does not vest any interest in the remaindermen until the termination of the life estate, at which time the heirs of the body then living will take. In the case of Emmerson v. Hughes, 110 Mo. 627, l.c. 629, 630, 631, 632, the court said:

> " * * * * The cause was tried upon agreed facts, from which it appears that Elizabeth O'Bannon and her husband, by their deed, dated the twenty-sixth of October, 1868, conveyed the land to 'Mary R. Godman for and during her natural life, and with remainder to the heirs of her body,' * * *
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> "At the date of this deed, Mary R. Godman had six children living. It is agreed that she had then reached such an age as to render future issue impossible. She, her husband and the six children executed and delivered deeds conveying all their interest in the land, and the defendant Simmons claims title under these deeds. After the execution and delivery of these deeds by Mary R. Godman, her husband and the six children, one of the children died without issue, and another one, a daughter, married Henry S. Emmerson. Mrs. Emmerson died in February, 1880, leaving the plaintiff as her only child, and Mary R. Godman died in 1888, leaving two sons and two daughters and the plaintiff, her grandson, as her only heirs-at-law.
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> "The case turns upon the construction of

the deed to Mary R. Godman. If the plaintiff's mother took a vested remainder by that deed, then he cannot recover, for in that event his mother's deed conveyed that interest; but if she took a contingent remainder only then he is entitled to recover.

"* * * * Here the deed by its own terms created a life-estate in Mary R. Godman with remainder 'to the heirs of her body.' Now there is nothing in this deed from which we can say that the word 'heirs' means children, and this being so, we must give to it its ordinary legal signification. As no one can be the heir of a living person, it must follow that there was, at the date of the deed, an uncertainty as to who would take in remainder; for it could not be told who would be the heirs of Mary R. Godman until her death. This uncertainty as to the persons who are to take in remainder is the very thing which creates one class of contingent remainders. This has been pointed out in numerous cases in this court, and it is sufficient to cite Rodney v. Landau, 104 Mo. 251, and the cases there cited.

"The deed here in question would, it is believed, create an estate tail at common law under the influence of the rule in Shelley's case. Section 8338, Revised Statutes, 1889, first enacted in 1835, abolishes the rule in Shelley's case (Riggins v. McClellan, 28 Mo. 23; Tesson v. Newman, 62 Mo. 198; Muldrow v. White, 67 Mo. 470), and at the same time declares what effect shall be given to a deed like the one now in question. * * * * By force of this section, those persons who were the heirs of the body of Mary R. Godman at the termination of the life-estate, that is to say at her death, took the estate in fee simple. As Mrs. Emmerson died during

> the life of her mother, the life-tenant, she was not an heir of her mother. The plaintiff, through his deceased mother, Mrs. Emmerson, became and was an heir of Mrs. Godman; for the expression, 'heirs of the body,' means and includes lawful issue, children, and through them grandchildren in a direct line. 1 Washburn on Real Property, 72.
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> "The statute just quoted converted the estate tail, created by the deed at common law, into a life-estate in the first taker with a contingent remainder in fee simple in favor of those persons who should answer the description of heirs of the body of the tenant for life. The plaintiff answers that description, and he is entitled to the one-fifth of the property. * * * *"

The rule is also stated in the case of Lewis v. Lewis, 136 S.W. (2d) 66, l.c. 71:

> "Reviewing the facts before us, we find that item 4 of the will devises the real estate described to respondent 'for the term of her life and, at her death, to the heirs of her body, absolutely in fee simple.' Respondent, therefore, took a life estate in said real estate with a remainder in fee unto those who should prove to be heirs of her body at her death. Sec. 3110, R.S. Mo. 1919, Mo. St. Ann. Sec. 3110, p. 1938. The remainder in fee was contingent or executory since the estate in remainder was limited to take effect upon an uncertain event, to-wit, respondent having heirs of the body, and to uncertain persons, to-wit, those who should be the heirs of her body at her death. * * * *"

Construing Section 3500, Mo. R.S.A., supra, the court said in the case of Kennard v. Wiggins, 160 S.W. (2d) 706, l.c. 709:

> "'Under these sections, the vesting of the fee-simple estate devised or conveyed is

> postponed until the termination of the life estate, and made to vest in the persons who are the heirs of such tenant for life at that time * * * *."

This principle of law was discussed by the court in the case of Stigers v. City of St. Joseph, 166 S.W. (2d) 523, l.c. 524, 528, 529, and the court held that a contingent remainderman did not have an interest that would entitle him to bring an action for damage to the property. The court said:

> "The petition (filed April 16, 1937) alleged that plaintiff Quantie Stigers was the owner of a life estate in the described real estate with remainder in fee to the heirs of her body; that such interest was acquired under a warranty deed from William Sallee, dated June 13, 1900, and duly filed for record; that the other plaintiffs were the two sons of Quantie Stigers; that they joined in the action for and on behalf of themselves and on behalf of whatever person or persons should afterwards be determined to be the heirs of the body of plaintiff Quantie Stigers; * * * *
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> " * * * * There is no suggestion in the record that plaintiffs William L. Stigers and Warren O. Stigers had or have any interest in the described real estate, except under the deed of William Sallee. * * * * If William Sallee had title and the said deed was in fact delivered during his lifetime, these plaintiffs are merely contingent remaindermen and the fee simple title will vest in the persons who, on the termination of the life estate, shall be the heir or heirs of the body of the tenant for life Quantie Stigers. * * * * While Quantie Stigers lives, these plaintiffs have no right to the possession or control of the described real estate nor any present estate therein, but only an interest, to wit, a

> chance or protective right to an estate in the event they survived their mother as heirs of her body at her death. * * * In such situation these plaintiffs now seek to recover damages for the trespass and injury to such future interest in said real estate, when it is not certain that they will ever have an estate therein or any vested rights to protect; nor that Quantie Stigers will be survived by any heirs of her body. Accordingly, these plaintiffs may not maintain this action for damages. * * * *"

The abstract you submitted has not been extended to date, and this opinion is written upon the assumption that the facts stated in the letter from Merrill and Enger, attorneys for Lena Martin, claimant, are true.

Conclusion.

It is, therefore, the opinion of this department that Lena Martin is one of the bodily heirs of life tenant Albert Grotjan and has a one-seventh interest in the property in question.

Respectfully submitted,

W. BRADY DUNCAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

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